Court of Appeals Div. II
Cause No. 45950-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEPARTMENT OF EMPLOYMENT SECURITY,
Appellant

v.

MARTIN MICHAELSON
Appellee,

# PETITIONER'S REPLY BRIEF

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## I. CLARIFICATION OF ASSIGNMENT OF ERROR

The State argues that its unclear what exceptions Mr. Michaelson is taking to the Administrative Findings of Fact and Conclusions of Law, so this Reply Brief will clarify and summarize.[1]

Petitioner takes exception to Finding of Fact #4 that:

"May 19, 2012, Claimant was involved in a preventable accident."

Petitioner takes exception to Findings of Fact #8 that:

claimant was discharged "for his third preventable accident."

Petitioner takes exception to Conclusion of Law #4 that:

"the employer met its burden of proof that Claimant was discharged for misconduct."

Petitioner takes exception to Conclusion of Law #5 that:

"the fact that the multiple accidents recurred in a year period shows a substantial disregard of the employer's interest."

[1] The Respondent's Brief states that this court must review the Commissioner's Decision, not the decision of the Administrative Law Judge (ALJ). But, the Commissioner merely incorporated by reference the ALJ's Findings and Conclusions, which are therefore referenced.

## II. REPLY ARGUMENT – MERE INVOLVEMENT IN AN ACCIDENT DOES NOT PROVE MISCONDUCT UNDER RCW 50.200.066

For reasons of economy, this Reply Brief will focus solely on the accident of May 19, 2012. This accident was caused by a third party who suddenly pulled behind Mr. Michaelson and stopped while Mr. Michaelson was backing his truck.

The employer in this case has a very confusing policy over when an employee is deemed responsible for an accident. The employer's two witnesses testified that "any time an accident results in damage, its chargeable." But the employee manual states that an accident is only chargeable if the employee is "accountable." The terms "accountable" is never defined, although the manual states that an accident is not chargeable "if the driver committed no violation of traffic ordinances, rules or safe driving practices and additional alertness and control would not have prevented the accident."

The State in this case is arguing that whether Mr. Michaelson was actually negligent and legally at fault for the accident on

May 19, 2012 is irrelevant. The State is arguing that mere involvement in an accident creates an irrebuttable presumption of misconduct as a matter of law. Its an absurd argument that has no basis in fact, law or justice.

## III. CONCLUSION

The employer failed to prove that Mr. Michaelson committed misconduct and the decision of the Commissioner was therefore properly reversed by the Superior Court.

Dated: This 3 day of October, 2014.

Nigel S. Malden, WSBA #15643
Attorney for Appellee Michaelson

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**DECLARATION OF SERVICE**

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I, Sara Lillie-Lugo, do hereby declare that this 3rd day of October, 2014, I forwarded a true and correct copy of Appellee Martin Michaelson's Reply Brief as specified below.

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- ☒ First Class U.S. Mail
- ☐ Facsimile
- ☒ E-mail
- ☐ Hand Delivered

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: This 3day of October, 2014.

Sara Lillie-Lugo
SARA E. LILLIE-LUGO
Legal Assistant to Nigel S. Malden